Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORA ANN RUWITCH, Trustee,
Irrevocable Trust Agreement of
WALLACE R. RUWITCH,
Petitioner,

vs.

WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals abdicate its duty under *Erie* and *Salve Regina* to apply the whole body of applicable substantive law in its *de novo* review of a state law question — including the state law applicable to the construction of insurance contracts — when it held that under Missouri law an insured applying for a life insurance policy containing a "good health clause" warrants the state of his health, when representations regarding the insured's health were only made on the best of the insured's "knowledge and belief," and the policy that issued expressly provided such statements are "representations and not warranties", and in light of the fundamental rules of Missouri law that conflicts in policy language must be resolved in favor of the insured and in accordance with the reasonable expectation of the insured?

2. Did the Court of Appeals err in holding under Missouri law, contrary to well-established Missouri precedent and the holding of the Court of Appeals for the Eleventh Circuit applying identical principles of Florida law to an identical policy issued by this same insurer, that the insurer can avoid paying benefits when there is no evidence that the statements in the application as to the insured's health were false?

LIST OF PARTIES

Petitioner before this Court is Flora Ann Ruwitch. Respondent is William Penn Life Assurance Company of America.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Flora Ann Ruwitch respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 1, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 966 F.2d 1235, and the slip opinion is reprinted at Appendix (App. A-1). The Order of the United States Court of Appeals for the Eighth Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Appendix (App. A-8).

The Court of Appeals reversed outright a judgment of the United States District Court for the Eastern District of Missouri entered pursuant to jury verdict on April 9, 1991. That judgment is reprinted in the Appendix (App. A-9). The Order of the District Court dated July 26, 1991 denying Respondent's motion for judgment notwithstanding the verdict and for a new trial is also reprinted in the Appendix (App. A-10).

JURISDICTION

On June 1, 1992, the United States Court of Appeals for the Eighth Circuit entered its Order reversing outright the District Court's prior judgment in favor of Petitioner. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on June 9, 1992. On July 7, 1992, the Court of Appeals denied both the Petition for Rehearing and the Request for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 7, 1990, Petitioner's husband, Wallace R. Ruwitch, died of colon cancer. At the time of his death, Mr. Ruwitch was 50 years old and had in force a two million dollar life insurance policy issued and delivered by Respondent William Penn Life Assurance Company of America on May 25, 1989. This term policy was purchased in connection with the acquisition of a business by Mr. Ruwitch in March of 1989.

On March 7, 1989 when Mr. Ruwitch applied for the policy, he appeared to be in excellent health. An extensive physical examination performed by a doctor selected by Respondent confirmed this fact.

After Mr. Ruwitch died, petitioner Flora Ann Ruwitch, his widow, made a proper claim for the policy proceeds. Her claim was denied by the Respondent. On July 9, 1990, Respondent filed a declaratory judgment action in the District Court, seeking

to avoid its obligation to pay the policy proceeds. Petitioner filed suit in a Missouri state court to collect the policy proceeds. After Respondent removed Petitioner's action to the District Court, the actions were consolidated for trial.[1] It is undisputed that the terms of this policy were to be construed in accordance with the laws of the State of Missouri.

On April 9, 1991, a jury in the District Court found for Petitioner and rejected the misrepresentation defense asserted by Respondent. The evidence at trial was undisputed that Mr. Ruwitch truthfully answered the question in the application regarding the existence of cancer because he had no knowledge of his colon cancer at the time he applied for coverage or at the time the policy was delivered. There was no evidence that Mr. Ruwitch had made a false representation or lied in stating that to "the best of his knowledge," he did not have cancer. It was undisputed that his cancer was diagnosed for the first time on June 20, 1989, after the policy had been issued and delivered.

It was also undisputed that this type of tumor was a "silent one", but one whose malignancy was very aggressive and spread rapidly to other parts of Mr. Ruwitch's body. The best treatment available, including his hospitalization at the Mayo Clinic and the M.D. Anderson Cancer Hospital, could not prevent the untimely death of Mr. Ruwitch.

Prior to trial, Respondent raised another claimed defense that Petitioner was also barred from recovery because of what Respondent termed a "good health clause" contained in the policy application. Respondent contended that the clause was applicable even though Mr. Ruwitch was not aware of his cancer. This clause provided that:

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[1] The jurisdiction of the District Court was based upon diversity of citizenship pursuant to 28 U.S.C. §1332.

> [N]o insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability *represented* in Parts I and II of this application. (Emphasis added).

The policy application consisted of two parts. Part I dealt with various vital statistics regarding Mr. Ruwitch. Part II consisted of a medical questionnaire and a medical examination to be completed by a physician selected by Respondent. In completing Part II of the application for this insurance, Mr. Ruwitch represented to Respondent's doctor that to the "best of his knowledge and belief," he did not have the various maladies listed in the questionnaire, including cancer. More specifically, Part I of the application contained the following provision regarding the nature and extent of Mr. Ruwitch's representations:

> The statements contained here and in Part II of this application and any supplement thereto, copies of which shall be attached to and made a part of any policy to be issued, are true to the *best of my knowledge and belief* and are made to induce the Company to issue an insurance policy. (Emphasis added).

The same "knowledge and belief" qualifier was contained in Part II of the application.

The final policy that was issued by Respondent expressly advised the insured that "[s]tatements in the application will be considered representations and not warranties."

Both sides had moved for summary judgment. The District Court (the Honorable George F. Gunn, Jr., a former justice of the Supreme Court of Missouri) overruled these motions.

After a five day trial, the case was submitted to the jury on Respondent's misrepresentation defense based upon its contention that in a final May 1, 1989, renewal application Mr. Ruwitch failed to disclose his last annual physical. Because Respondent adduced no evidence that Mr. Ruwitch had knowledge of his cancer or that any of his representations about his health were false, Judge Gunn refused to submit Respondent's so-called "good health" defense to the jury.

The jury rejected Respondent's misrepresentation defense and returned a verdict finding that Petitioner was entitled to recover the life insurance proceeds in the sum of $2,000,000, plus interest. Judge Gunn overruled Respondent's post-trial motions, which relied primarily on the trial court's refusal to enter judgment in Respondent's favor as a matter of law.

The Court of Appeals, in a terse seven page opinion, reversed Judge Gunn outright and remanded for entry of judgment in favor of Respondent. Recognizing the rule of *Salve Regina College v. Russell*, __ U.S. __, 111 S.Ct. 1217 (1991), it undertook its own analysis of Missouri law on a *de novo* basis. It stated that "Missouri courts recognize and enforce good health clauses in insurance contracts"; it then proceeded to construe this "good health" clause as an absolute one and held that even though the insured had no knowledge of his cancer, Respondent was entitled to judgment as a matter of law.

It cited the applicable provision of the policy and ruled (correctly) that "designation of the good health clause in this contract as either a warranty or a condition precedent" makes no difference (App., A-6), but then ignored the impact of the no warranty provision, the fact that this good health clause was based upon what the insured "represented" about his health, and that these representations were expressly based only on his "knowledge and belief." Ultimately, the Court held that the "good health" clause was in fact a warranty because "to construe the good health clause otherwise would render it superfluous."

(App., A-7). In doing so, the Court failed to cite, distinguish, or consider objectively the cited Missouri cases which hold that where there are conflicting clauses in a policy, all doubts must be resolved in favor of the insured, not the insurer.

Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied.

REASONS FOR GRANTING THE WRIT

I. THE OUTRIGHT REVERSAL BY THE COURT OF APPEALS WAS A PATENTLY IMPROPER APPLICATION OF THE GOVERNING MISSOURI LAW.

The first and fundamental reason for granting the writ is that the decision of the Court of Appeals is egregiously in error, with devastating effect on this individual Petitioner. She has been deprived of insurance on her late husband's life, without justification, when she is entitled to that insurance under well-established principles of Missouri law. The Eighth Circuit panel, consisting of three judges from states other than Missouri, reversed outright the judgment below and directed Judge Gunn to enter judgment in favor of Respondent. In so doing, the Court of Appeals obliterated well-established Missouri rules applicable to cases involving insurance clauses like those contained in this policy. It ignored and misapplied the time-honored rule of construction established in Missouri and by this Court that any ambiguity in a life insurance policy must be construed against the insurer. Indeed, the Court of Appeals in its Opinion established a new rule of construction that such doubts should be resolved in favor of the insurer.

The Opinion is simply wrong. The Court made a fundamental error in misconstruing and misapplying the language of the policy which expressly provided that representations in the application concerning the health of Mr. Ruwitch, including whether or not he had cancer, were made to the best of his "knowledge and belief," that Respondent promised in its policy that such statements in the application would be considered "representations and not warranties," and that the sound health clause relied upon was only based upon the actual state of insurability and health as so "represented" by Mr. Ruwitch in Respondent's application.

The Court cited and thus gave lip service to the relevant clauses in the policy. However, the Court of Appeals ignored the critical significance of the terms of the policy drafted by Respondent:

(1) The Court, after concluding that it made no difference whether a good health clause was treated as a warranty or condition (App., A-6), totally ignored the fact that this policy especially provided that the statements in the application, including the "no cancer" representation relied on by Respondent, were *not* to be considered as warranties. The Court in its outright reversal necessarily found that the "good health clause" operated as a warranty and that it was "breached" whether or not Mr. Ruwitch knew of his cancer.

(2)The policy expressly provided that the representations concerning the insured's health were only based on the insured's "knowledge and belief." Thus, all that was "represented" by Mr. Ruwitch in Respondent's "good health clause" was his state of mind. Therefore, for Respondent to successfully assert any good health clause defenses, it was compelled to prove falsity under both the Missouri and Federal case law, i.e., that Mr. Ruwitch somehow had knowledge of his cancer. He had no such knowledge. There was no such evidence. As a matter of law, his representations about his health were true.

(3)This "good health clause" was dependent upon a "representation" of the insured which in turn was expressly based upon his "knowledge and belief". Such a representation cannot be converted into a warranty. To be applicable, the clause required proof that what Mr. Ruwitch's representation was false. He had no such knowledge. There was no evidence that he did. There was no false statement as a matter of law as expressly required under Missouri law.

(4)Without any analysis, the Court simply jettisoned these critical provisions from the policy and determined Respondent's

unilateral "intent" based upon novel, but incorrect, rules of insurance policy construction — namely that any insurance policy should be construed in favor of the insurer, rather than the insured, and that the construction should favor enforcement of a forfeiture provision in a policy application that conflicts with express policy provisions. It did this when it erroneously held that to construe the "good health" clause as requiring proof of knowledge "would render it superfluous." (App., A-7). In fact, the Court's faulty logic necessarily renders "superfluous" the above cited policy provisions which were placed in the policy to protect the policyholder. The Court of Appeals has rendered those clauses illusory and legally ineffective.

That Court failed to recognize and apply the principle that an insurance policy, because it is a contract of adhesion, must be construed in light of the insured's reasonable expectations. Instead, the Court of Appeals adopted and applied new and unprecedented rules of life insurance construction— namely that an ambiguity must be resolved in favor of the insurer and that, in resolving conflicting policy provisions, a federal court should determine the unilateral intent of the insurer, rather than focusing upon the reasonable expectations of the insured, all with the design of upholding and enforcing life insurance policy forfeiture provisions.

II. THE COURT OF APPEALS FAILED TO APPLY MISSOURI LAW AS REQUIRED BY *ERIE RAILROAD V. TOMPKINS* AND IN ITS ATTEMPT TO PROVIDE *DE NOVO* REVIEW AS PRESCRIBED BY *SALVE REGINA* SO FAR DEPARTED FROM THE LANGUAGE OF THE POLICY AND MISSOURI LAW AS TO REQUIRE REVERSAL BY THIS COURT.

This Court should exercise its certiorari discretion and grant this Petition both to correct the outrageous decision below and to

clarify the role of federal courts of appeal in resolving questions of state law under the *Erie* doctrine in light of the standard of review established in *Salve Regina*. Distortion of controlling state law and state public policy, based upon a cursory review and narrow view of state law by a federal court, is not what this Court intended in *Salve Regina*, and is in clear violation of the *Erie* doctrine. *De novo* review has been used by the Eighth Circuit under the facts of this case as a license to create its own rules of life insurance policy construction— rules which contradict and subvert well-established Missouri law and Missouri public policy. To prevent its recurrence, to protect Petitioner and other Missouri life insureds from such injustice, and to redress the injustice done in the case at bar, this Petition for Certiorari should be granted.

This Court in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), expressly held that federal courts in diversity cases have the constitutional duty to correctly and fully apply the law of the State. The Court rejected the prior rule of *Swift v. Tyson* in order to prevent forum shopping in diversity cases and the discriminatory effect which *Swift* had upon resident plaintiffs. In expounding upon these concerns, the Court reasoned:

> [T]he mischievous results of the [*Swift*] doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift v. Tyson introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law.

Id. at 74-75.

About one week after *Erie*, this Court in *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202 (1938), held that the principles of *Erie* applied with equal force to state law claims and defenses involving life insurance contracts. In reversing the judgment below in favor of the insurer, the Court held:

> Application of the "State law" to the present case, or any other controversy controlled by [*Erie*], does not present the disputants with duties that are difficult or strange. The parties and *the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts.*

Id. at 208-209. (Emphasis added). Here the Court of Appeals wholly failed to follow this clear mandate.

Likewise, in *Stoner v. New York Life Insurance Company*, 311 U.S. 464, 85 L.Ed.2d 284 (1940), the Court reviewed the Eighth Circuit's failure to apply the decisions of a Missouri appellate court that were clearly applicable to the dispute. In *Stoner*, an insurer instituted a declaratory judgment action, claiming that it was no longer obligated to make disability payments to the petitioner under insurance policies which it issued. The district court, following two state appellate court decisions which had construed the exact same policy language in similar suits between the parties, found that the petitioner was totally disabled within the meaning of the policy and rendered judgment for the insured. The Court of Appeals reversed the district court, holding that the evidence established, as a matter of law, that the insured was not totally disabled and remanded with instructions to enter judgment in favor of the insurer. *Id.* at 465-467.

In petitioning for certiorari, the insured argued, *inter alia*, that because the Eighth Circuit ignored clearly controlling decisions of the state appellate court "it is apparent that the [court of appeals] opinion below is not based on the law of the state but upon the 'general law'." *See* Summary of Argument of Petitioner, reprinted at 85 L.Ed.2d at 285.

This Court, relying upon *Erie*, granted certiorari, reversed the Eighth Circuit, and reinstated the judgment and findings of the district court. The Court stated:

> We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of [*Erie*], must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently.

Id. at 467.

This Court has granted certiorari in many other cases where a court of appeals has misapplied state law. *See, e.g., Guaranty Trust Company v. York*, 326 U.S. 99 (1945) and *Palmer v. Hoffman*, 318 U.S. 109 (1943).

There is also a recognized tradition in this Court of granting certiorari for the principal purpose of righting a grave injustice to an individual litigant, particularly where the injustice emanates from a federal court's clear deviation from established precedent, be it binding federal or state law. This tradition is applicable in civil as well as criminal cases. *See, e.g., Massachusetts Mutual Life Insurance Company v. Ludwig*, 426 U.S. 479 (1976); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Montana v. Kennedy*, 366 U.S. 308 (1961). Exercise of certiorari for that purpose is also implicitly recognized by Supreme Court Rule 10.1(a).

In *Salve Regina College v. Russell*, __ U.S. __, 111 S.Ct. 1217 (1991), the Court held that the courts of appeals must determine state law questions in diversity cases *de novo*, that is, without reliance on the experience and wisdom of the District Court. *Salve Regina* has placed an added burden on the courts of appeals in diversity cases. The case at bar demonstrates how, without further guidance and clarification from this Court, the courts of appeal can go astray in discharging that duty.

Here, with almost casual dispatch, the Court of Appeals summarily reversed the District Court and issued a cryptic opinion, an opinion totally devoid of any true analysis of either the conflicting clauses put in the insurance policy by the Respondent or the Missouri case law applicable to such policy provisions. The Court of Appeals effectively turned Missouri law on its head by construing the language of the policy in favor of the insurer instead of the insured in contravention state law principles and public policy applicable to insurance policies.

A. The Court Failed to Apply Missouri Law Applicable to an Insurance Policy Which Contains Non-Warranty Language of the Kind Present in This Policy.

Missouri law is clear that in a policy such as this one, the non-warranty provision requires proof of a misrepresentation by the insured in order to void insurance coverage. In contravention of Missouri law and this expressed policy provision, the Court of Appeals held that Mr. Ruwitch warranted that the state of his health was as described in the application, thus completely negating the "representations and not warranties" language. In doing so, the Court totally misconstrued the policy language and did not apply the Missouri case law applicable to such provisions. This Court should not allow such a distortion of Missouri law to stand. Nor should it allow this gross injustice to the Petitioner and blatant violation of the *Erie* doctrine to remain unredressed.

In *Houston v. Metropolitan Life Insurance Company*, 97 S.W.2d 856 (Mo. App. 1936), the insured died of cancer. The insured represented in the policy application that she had never had cancer. After the policy was issued, the insured died of cancer. The insurer failed to prove that the insured had knowledge of her cancer.

The insurance policy contained the following provision: "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." *Id.* 857. The court rejected the insurer's claim that the insured's knowledge was irrelevant, and enforced the policy in favor of the insured. In light of the no warranty provision, the court stated:

> So, in *Pacific Mutual Life Insurance Co. v Glaser*, 245 Mo. 377, 150 S.W. 549, 45 L.R.A. (N.S.) 222, relied upon by defendant, the application expressly warranted that all statements and answers made in the application were complete, true, and correct, and that if any such statement or answer was incomplete, untrue, or incorrect, no valid claim could arise under the policy on account of the death of the insured. *There is no such warranty in the application or policy here in suit.* On the contrary, the policy provides that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

Id. at 859. (Emphasis added).

On rehearing, the court reemphasized the importance of this "no warranty" policy provision by holding:

> It is true, as urged by defendant, that the application in this case contains a clause to the effect that the statements in the application shall form the basis of the contract of insurance, but not withstanding this clause, *the statements, under the express provision of the policy, in the absence of fraud, must be deemed representations and not warranties. So they must be treated as representations and must be disposed of under the law applicable to representations. So treating them, they are ineffectual to avoid the policy unless fraudulently made.* It is important to observe that the language of the policy is not merely that the statements shall not be deemed warranties, but the language goes further and affirmatively declares that the statements shall be deemed

> representations. *By what rule of construction then may this court convert such statements into warranties or conditions avoiding the policy*?

Id. at 862. (Emphasis added).

The Missouri Court of Appeals reaffirmed the *Houston* holding in *Cohen v. Metropolitan Life Insurance Company*, 444 S.W.2d 498 (Mo. App. 1969). In *Cohen*, the policy contained a no warranty provision identical to the one in the instant policy. It expressly provided that: "All statements made by the insured in the application for this policy shall be deemed representations and not warranties." *Id.* at 503.

The *Cohen* Court ruled that the insurer was required to prove knowledge. Relying on *Houston*, the Court held:

> The defendant insurance company in our case expressly framed General Provision No. 8 in the insurance policy in no uncertain terms that the statements in the application shall be representations and not warranties. We rule that the statements of the plaintiff in her application to be representations and not warranties.

Id. at 504. *See also Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135, 139 (Mo. App. 1942).

The Court of Appeals ignored the applicable policy language referred to above, cited only the Missouri cases which enforce absolute good health clauses, and then held, as a matter of law, that the "good health" clause in this policy barred Petitioner's recovery, even though there was absolutely no evidence that the insured had knowledge of his cancer or that Mr. Ruwitch made any false statement in the insurance application. In so doing, it totally ignored the Missouri cases construing policies with non-warranty language as requiring proof of *scienter*, and requiring that representations made pursuant to such policies must

be treated as representations and disposed of under the Missouri case law applicable to representations.

The Court of Appeals found that under Missouri law, it makes no difference whether the good health clause is designated as a warranty or a condition. (App., A-6). This is a correct statement of Missouri law only to the limited extent that, as reflected by the cases cited in the Court's opinion, Missouri courts regard conditions precedent and warranties as equivalent in their analysis of the effect of forfeiture provision in life insurance contracts. However, the Court ignored an entirely distinct class of statements in insurance applications—representations. This category is the class into which the statements in this application fall, by the express terms the policy that was issued and delivered by Respondent. Under Missouri law, representations as to good health are grounds for avoidance by the insurer only if they are knowingly false.

The Court of Appeals totally disregarded the policy provision that statements about the insured's health would only be regarded as representations and not as warranties. It reasoned that to give that clause meaning would make the good health clause "superfluous" notwithstanding the fact that this finding necessarily renders the "representations, not warranties" provision superfluous for the sole purpose of saving the "good health" clause from perceived superfluity. (App., A-7).

B. The Court Also Violated *Erie* When It Converted a Policy Representation Based Upon "Knowledge and Belief" into a Warranty

This "good health" clause was not an absolute one. Where there is a true good health clause, an insured's statement denying the existence of an existing disease is a "false statement," even when innocently made. Here the express "knowledge and belief" qualification to the statement of Mr. Ruwitch about his health expressly shifted the focus in determining the truth or

falsity to his state of mind. In this policy it was incumbent upon Respondent to prove that Mr. Ruwitch made representations about his health which were contrary to his "knowledge and belief"; that is, that he lied. In the absence of such a false statement by the insured, a good health clause does *not*, in *this policy*, result in the forfeiture of insurance coverage.

It is well-established under Missouri law that a suit for rescission of an insurance policy requires proof that the answers in the application are false in fact. In *Dixon v. Business Men's Assurance Company*, 365 Mo. 580, 285 S.W.2d 619 (1955), the Missouri Supreme Court expressly noted how this falsity requirement applies, even to policies containing *true* good health clauses:

> The rule in this state, as we understand it, is that where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy, then the representations, *if in fact untrue*, will avoid the policy, though the representations were innocently made.

Id. at 625. (Emphasis added). *See also Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135, 139 (Mo. App. 1942) ("We will first determine the nature of the insured's declaration... for if it was a warranty the defendant carried only the burden of showing the falsity of the statement, [citation omitted], while if it was a mere representation the burden rested upon defendant to show, not only that the statement was false, but that it was material to the risk and made wilfully and in bad faith with intent to deceive the insurer").

In *New York Life Insurance Company v. Calhoun*, 97 F.2d 896 (8th Cir. 1938), the Eighth Circuit, applying Missouri law, noted:

> The determining issue in this case is whether or not the insured's answers to the questions in the application were false. Appellant and appellee differ as to whether an innocent misrepresentation will, under Missouri law, void the policy. But it is not disputed that the representation upon which a suit for rescission is based must be false in fact... The burden was upon the company to establish the falsity of the statements in the application by clear and convincing evidence.

Id. at 898.

This falsity requirement is in fact a part of the Missouri Approved Jury Instructions, "M.A.I. 32.20," applicable to insurance policies where an insured's statements are construed as conditions or warranties. *See* item "Second", App. A-11.

Consequently, in determining the applicability of any "good health" clause, the Court was required under Missouri law to determine whether Mr. Ruwitch's statements regarding his health were false. In this case, Mr. Ruwitch merely "represented" that to the "best of his knowledge and belief" he did not have cancer. This statement was true in every respect. Thus, Respondent offered no evidence to justify the submission of its "good health" defense because it did not establish that his representation was false.

The courts have so interpreted such knowledge and belief applications and have required proof of knowledge. *See, e.g.*, *Bohm v. Fidelity and Casualty Company of New York*, 399 S.W.2d 450, 453 (Mo.App. 1966) ("At the time of applying he was not asked whether he was in sound condition or whether he had any mental or physical defect. The questions put to him related to his knowledge and belief and accordingly, . . ., the real query should have been, what was his state of mind at the time?"); *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359, 1363 (11th Cir. 1990) (In construing this same Penn Life

policy language, the Court held that the innocent statements made on the applicants' knowledge and belief rendered the answers "truthful and accurate"); and *Skinner v. Aetna Life and Casualty*, 804 F.2d 148, 150 (D.C. Cir. 1986) ("In the case before us, [the insurer] chose to include language in its group insurance form that had the effect of shifting the focus, *in a determination of the truth or falsity of an applicant's statement*, from an inquiry into whether the facts asserted were true to whether, on the basis of what he knew, the applicant believed them to be true"). *See also American Family Life Insurance v. Reeves*, 455 S.W.2d 932 (Ark. 1970); *Dean v. Nationwide Life Insurance Company*, 536 P.2d 1122 (Idaho 1975); and *Lentz v. Prudential Insurance Company of America*, 520 P.2d 769 (Mont. 1974).

In reversing the District Court, the Court of Appeals' Opinion ignored this requirement of falsity, in contravention of well-established Missouri precedent as required under the *Erie* doctrine. The opinion does not even mention the word falsity or deal with the concept where the good health representation is based upon the insured's "knowledge and belief".

Erie requires a federal court sitting in a diversity case to apply the "entire body of substantive law" in resolving this dispute, including the element of falsity required for the successful assertion of any "good health" affirmative defense. *See Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 208-209 (1938). The Court of Appeals instead relied upon a line of Missouri cases applicable only to pure good health clauses, none of which involve or discuss all of the relevant clauses contained in this policy. The cases relied upon by the Court of Appeals simply do not address the well-rooted state law principles of life insurance policy construction and well-established rules regarding the element of falsity which must be proven in order to successfully prevail on this affirmative defense under Missouri law. A federal court of appeals may not, under the rubric of *de novo* review, ignore state law requirements regarding the sub-

mission of affirmative defenses by creating its own *ad hoc* rules of policy construction which have absolutely no foundation or support in state law.

C. The Court Failed to Follow the Well-Established Missouri Rules of Construction That a Life Insurance Policy Should be Construed Strictly Against the Insurer and Liberally in Favor of the Insured, and That Such Policies Should Be Construed Based Upon the Insured's Reasonable Expectations.

By focusing on and only giving legal effect to the policy language which favors the enforcement of what it construed to be a "good health" warranty provision and the consequent forfeiture of life insurance coverage, the Court disregarded well-delineated principles of Missouri law applicable to the construction of insurance contracts in general and life insurance policies in particular: conflicts in language are to be resolved in favor of the insured; an insurance contract, deemed a contract of adhesion under Missouri law, must be construed to protect the reasonable expectation of the insured; and, most importantly, the harsh result of forfeiture should be avoided at all costs to protect the insured if the policy can be construed in any fashion favorable to the insured.

The Court in fact construed the policy in favor of the wrong party, Respondent. In deciding that the coverage under the Respondent's policy was forfeited, the Court construed its "good health" clause as an absolute one, a warranty of good health. It held that it made no difference whether this policy language is treated as a warranty or a condition, but then ignored the fact that the policy itself provided that there was no warranty, that the insured's statements were based upon the best of the insured's knowledge and belief, and that the good health clause was itself based upon what was "represented". At the very least, the conflicting language is ambiguous.

Missouri courts hold that in life insurance cases involving a conflict in policy terms, where the policy is subject to different interpretations, the court *must* interpret the policy in a fashion that will not result in a forfeiture of coverage. In *Cohen v. Metropolitan Life Insurance Company*, 444 S.W.2d 498 (Mo. App. 1969), the court set forth this well-established principle of insurance contractual construction as follows:

> In the law of insurance the courts do not favor warranties. If there is doubt they lean against a construction of a statement by an insured or applicant as a warranty and unless it is clearly shown by the form of the contract to have been *intended by both parties to be a warranty*, to be strictly and literally complied with, it will be held to be a representation.

Id at 504. (Emphasis added).

In *Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135 (Mo. App. 1942), the court noted:

> In determining whether a statement of the insured, contained in the original application for the policy or in an application for reinstatement, is a warranty or a representation, we must bear in mind that courts are strongly inclined against forfeitures and will consider a statement a warranty only when it clearly appears that such was the intention of the contracting parties, for the doctrine of warranty is one of great rigor and frequently operates harshly upon the insured.

Id at 139.

In *Dyer v. Kansas City Life Insurance Company*, 188 S.W.2d 758, 760-761 (Mo. App. 1945), the court set forth the strong Missouri public policy reasons why such construction of insurance policies is required:

> The insurer has the opportunity to have the language of the contract selected with great care and deliberation by experts and legal advisers acting exclusively in its interest, and is responsible for any ambiguity found therein. . . . It is, therefore, well established that where the meaning of a policy provision is doubtful or susceptible of different constructions, the policy should be construed strictly against the insurer and liberally in favor of the insured.

These cases are in accord with the well-recognized principle of Missouri law that an insurance policy must be construed in favor of the insured. *See Bellamy v. Pacific Mutual Life Insurance Company*, 651 S.W.2d 490, 495 (Mo. banc 1983) ("An insurance contract reasonably susceptible of any interpretation favorable to the insured will be so construed in order to avoid a forfeiture"). Indeed these basic tenets of policy construction had been previously followed by the Eighth Circuit in construing Missouri law. *Hampton Foods, Inc. v. Aetna Casualty and Surety Company*, 787 F.2d 349, 351-352 (8th Cir. 1986).

Here, there is a direct conflict between Respondent's version of its "good health clause" and the no warranty and "knowledge and belief" provisions of its policy. Under this scenario, the policy is therefore clearly ambiguous and should have been interpreted in favor of Mrs. Ruwitch. *See Behr v. Blue Cross Hospital Service, Inc.*, 715 S.W.2d 251, 256 (Mo. banc 1986) ("If a contract promises something at one point and takes it away at another there is an ambiguity."); and *Howard v. Russell Stover Candies*, 649 F.2d 620, 623-624 (8th Cir. 1981).

More recently, the Missouri courts have held that in construing insurance contracts, deemed contracts of adhesion under Missouri law, a court must attempt to effectuate the reasonable expectations of the insured. This principle of insurance policy construction was recognized and applied in *Estrin Construction Company, Inc. v. Aetna Casualty and Surety Company*, 612 S.W.2d 413 (Mo. App. 1981), wherein the court reasoned:

> An insurance policy is a contract of a distinctive species. It is the instrument whereby one contractor transfers to the other contractor [with the means to allocate the loss] who agrees to assume the risk for a consideration. [Citation omitted]. It is also a contract of adhesion. [Citations omitted]. The basic purpose of contract law is to protect the reasonable expectations induced by the agreements. [Citation omitted]. Thus, whether assent to contract rests upon negotiation or only adherence, the rules of construction subserve to give effect — as nearly as possible — to the expectations which induced agreement. [Citation omitted]. In a negotiated contract, the words of agreement describe the terms of the bilateral assent and so — when stated unambiguously — are sufficient to disclose the reasonable expectation of the parties. [Citation omitted]. In a contract of adhesion, however, the terms are imposed by the proponent of the form: they are not expected to read or even if read, the adherent has choice only to conform. [Citations omitted]. The *assent* is resembled rather than actual. The printed words of contract alone, therefore, are not enough to disclose the expectations of the parties. The court must look for that purpose to the full circumstances of the transaction — whether the written words of the contract be ambiguous or unambiguous. [Citations omitted]. Our decisions understand that reality and give effect to the substance over the form of such an agreement.

Id. at 418-419.

This reasonable expectation of the insured test has been applied by the Missouri Supreme Court, as well as by federal courts applying Missouri law. *See, e.g., Rodriguez v. General Accident Insurance Company of America*, 808 S.W.2d 379, 381-382 (Mo. banc 1991)("If there is a conflict between a technical definition within a contract, and the meaning which would reasonably be understood by the average layman, a

layperson's definition will be applied unless it plainly appears that the technical meaning is intended"); *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 697 (Mo. banc 1982)(The Court describes the objective reasonable expectation doctrine as a "rule provid[ing] the objective reasonable expectations of adherents and beneficiaries to insurance contracts will be honored even though a thorough study of the policy provisions would have negated theses expectations"). *See also Atkins v. Hartford Casualty Insurance Company*, 801 F.2d 346, 348 (8th Cir. 1986); *Farmers & Merchants Insurance Company v. Mid-Century Insurance Company*, 752 F.Supp. 890, 893 (E.D. Mo. 1990).

These well-established principles of construction were established and applied by an early case decided by this Court, which is strikingly similar to this case. In *Moulor v. American Life Insurance Company*, 111 U.S. 335, 4 S.Ct. 466, 28 L.Ed. 447 (1884), the policy application contained language more favorable to the insurer in that the "good health" clause provided that statements therein were to be treated as a "warranty". However, the policy contained a provision that statements in the application would be treated as mere representations.

The Court, in attempting to reconcile these clearly inconsistent provisions, refused to permit the "good health" clause to operate as a warranty by holding:

> Taken together, it cannot be said that [the application and the policy] have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the Company intended to require and the insured intended to promise an exact, literal fulfillment of all of the declarations embodied in the application. It is true that the word "warranted" is in

> the application... *yet it is a fact, not without some significance, that the word was not carried forth into the policy, the terms of which control when there is a conflict between its provisions and those of the application.* The policy upon its face characterizes the statements of the insured as representations. Thus, we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from a strict warranty.

Id. at 342-343. (Emphasis added). *See Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135, 139-140 (Mo.App. 1942) (Court adopts the reasoning in *Moulor* in its entirety).

The Opinion of the Court of Appeals is in direct conflict with these clear precedents and established Missouri public policy. Its finding that but for Respondent's construction, the "good health" clause would be "superfluous" is simply wrong and provides no basis for the Court of Appeals to rewrite the clause to comport with its assumptions about Respondent's unsubstantiated intent. Moreover, the Court, rather than focusing on the reasonable expectations of the insured, based its holding solely upon what it perceived was Respondent's intent in inserting the so-called good health provision into the policy, despite the fact that there was no parol evidence offered by Respondent on the issue of intent.

There is no evidence in the record regarding the origin of the "knowledge and belief" language, the purpose of the no warranty provision in the policy, or the reason why Respondent did not use

an absolute good health warranty in its application — a warranty which would have made it crystal clear to Mr. Ruwitch that the existence of any disease, known or unknown, would result in the forfeiture of life insurance coverage. The Court bypassed fundamental principles of insurance policy construction by accepting Respondent's present argument about its "intent", while ignoring what a prospective insured would expect when statements regarding health are made which the insurer expressly promised would be treated as representations made to the best of his knowledge and belief.

Analyzing the literal words of the clause, especially those by which Mr. Ruwitch only "represented" his health based upon his "knowledge and belief", shows that the clause is *not* superfluous. The clause is only *inapplicable* in *this* case because Respondent has *no* evidence whatsoever that the insured had knowledge of his cancer. If Respondent in some other case presented proof of such knowledge, it could rely upon the clause to avoid policy coverage. It simply did not have the evidence to justify the application of that clause under the fact of *this* case.

D. This Court should Grant Certiorari to Rectify This Egregious Wrong.

The combination of *Erie Railroad* and its progeny and the *de novo* review standard required by *Salve Regina* have imposed a heavy burden on the judges of the courts of appeal. This is particularly true of appellate judges who carry heavy dockets and are then required to decide unfamiliar rules of state law, without the benefit of reliance on experienced trial judges who are not only more familiar with the case, but also more knowledgeable of the state law.

We urge that this Court right the wrong which is clearly evidenced by the decision in this case. We suggest that this

Petition presents a case where this Court should exercise its supervisory power to correct the clear error below.

Alternatively, this Court in its review might choose to modify the rigid language of *Salve Regina* to permit the courts of appeal to accord some deference to rulings of the district courts. The Court might also choose to grant certiorari in order to set forth in greater detail than does existing law the procedure to be followed by courts of appeal in resolving state law questions in the context of *de novo* review. In particular, the appellate court should be required to address the full body of state law presented to it by the parties—including state law rules of construction and state public policy— as well as all colorable arguments presented by them. *Erie* demands and requires nothing less. Only in this fashion can it be insured that what happened here will not regularly recur: appellate judges, unfamiliar with a large complex body of state law in a specialized area, reaching a result directly inconsistent with established state law and fundamental state public policy.

III. THE OPINION OF THE COURT IS IN CONFLICT WITH A DECISION OF THE ELEVENTH CIRCUIT CONSTRUING THIS SAME POLICY

The Court of Appeals' decision directly conflicts with an Eleventh Circuit decision interpreting this very "knowledge and belief" qualification in the very same policy application used by Respondent here. In *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990), an affiliate of Respondent instituted a Declaratory Judgment action seeking to void two life insurance policies of insureds who were ultimately determined to have AIDS. The insurer contended that it could avoid its policy obligations by relying on a Florida statute which permitted an insurer to void insurance coverage based upon a false statement without proof of knowledge.

The Court rejected the insurer's argument because the policy application, the same one present in the instant policy, provided that the insureds' representations were only made to the best of their knowledge and belief. The Court held that the innocent statements made to the best of the applicants' knowledge and belief rendered their responses "truthful and accurate". *Id.* at 1363.

In so holding, the Court reasoned:

> "In the case before us [the insurer] chose to include language in its group insurance form that had the effect of shifting the focus, *in a determination of the truth or falsity of an applicant's statement*, from an inquiry into whether the facts asserted were true to whether, on the basis of what he knew, the applicant believed them to be true. Thus, [the insured's] answer must be assessed in light of his actual knowledge and belief."

Id. at 1363 (Emphasis added) (Quoting from *Skinner v. Aetna Life and Casualty*, 804 F.2d 148, 150 (D.C. Cir. 1986)).

In justification of this result, the *Sands* Court noted the following:

> Had Penn Life intended to retain the ability to void the contract based upon any inaccuracy, it should not have used the "knowledge and belief" qualifying language. Such language would reasonably induce an insurance applicant to believe that they were covered under the policy if they answered the questions as to the best of their knowledge and the insurer subsequently issued the policy. To permit an insurer to rescind a policy containing "knowledge and belief" language due to an unknowing misstatement not only contravene the terms of the contract itself, but is unfair as well.

Id. at 1364, n.7.

We are aware that this Court does not usually grant certiorari to review a conflict among the Circuits regarding a different construction of state law. However, this Petition presents a conflict with dramatically opposite results and involving the very same policy issued by an affiliate of the Respondent. What is the public, including those who buy and sell insurance polices, to conclude when two federal courts come to completely different results, not just on a rule of law, but in issuing dramatically opposite constructions of the same material clause in the same insurance policy?

CONCLUSION

The decision of the Court of Appeals is shockingly wrong. A grave injustice has been committed. There is a recognized tradition in this Court of granting certiorari for the principal purpose of righting a grave injustice to an individual litigant, particularly where the injustice emanates from a federal court's failure to accord rights derived from state substantive law. Exercise of certiorari for that purpose is implicitly recognized by Supreme Court Rule 10.1(a).

A continuation of this tradition, and its application in the case at bar, will have an effect reaching far beyond righting the obvious injustice done to Mrs. Ruwitch. It will serve notice to the courts of appeal that in reviewing state law questions, they must take seriously this Court's admonition that they consider the entire body of applicable state law and reach decisions in accordance with binding state precedent and state public policy. Their knowledge that, in exercising their new, far-reaching power in ruling on state law questions, their fiat is not beyond control, and that they must answer not only to reason, but also in exceptional cases to the scrutiny of this Court, will only improve the administration of justice, to the benefit of many litigants in addition to Petitioner.

The writ should issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2943

Flora Ann Ruwitch, Trustee,
Irrevocable Trust Agreement of
Wallace R. Ruwitch,
Appellee,

v.

William Penn Life Assurance Company of America,
Appellant.

William Penn Life Assurance Company of America,
Appellant,

v.

Flora Ann Ruwitch, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 12, 1992
Filed: June 1, 1992

Before WOLLMAN and MAGILL, Circuit Judges, and LONGSTAFF,* District Judge.

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* The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa, sitting by designation.

WOLLMAN, Circuit Judge.

William Penn Life Assurance Company (Penn Life) appeals from a judgment against it for breach of its contract to insure the life of Wallace R. Ruwitch. We reverse and remand with directions to enter judgment for Penn Life.

I.

In early 1989, Wallace R. Ruwitch decided to purchase a $2 million policy of insurance on his life in order to secure loans for his purchase of a new business, Dow Screw Products. After analyzing policies from several competing company, Ruwitch chose to purchase a policy from Penn Life. Ruwitch and Penn Life's agent completed an application for insurance, naming Dow Screw as the owner and beneficiary of the policy.

The application that Ruwitch filled out had two parts. Part I required Ruwitch to furnish information such as address, date of birth, and name of beneficiary. Part II required Ruwitch to furnish information about his past and present medical condition. Included was a question, to which Ruwitch answered "no," asking whether Ruwitch had ever had cancer. Each part contained a clause stating that the information supplied was true to the best of Ruwitch's knowledge and belief. Part I stated:

> The statement contained here and in Part II of this application and any supplements thereto, copies of which shall be attached to and made a part of any policy to be issued, are true to the best of my knowledge and belief and are made to induce the Company to issue an insurance policy.

Part II stated:

> The statements and answers are true to the best of my knowledge and belief and are made for the purpose of inducing the company to issue insurance on my life.

Both Part I and Part II were signed by Ruwitch. Part I also contained a "good health" or "sound health" clause stating:

> [N]o insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability represented in Parts I and II of this application.

In addition, the policy itself contained a clause which said that "[s]tatements in the application will be considered representations and not warranties."

A few days after filling out the application, Ruwitch underwent a physical examination performed by a physician hired by Penn Life. On April 6, Ruwitch's own physician furnished Penn Life medical information based on Ruwitch's April 1988 physical. Both physicians concluded that Ruwitch was in good health.

Penn Life issued a policy to Dow Screw on April 26, and Dow Screw in turn sent the first premium check to Penn Life.[1] Ruwitch then decided, for estate tax reasons, to apply instead for a policy naming his insurance trust as the policy's owner and beneficiary. He and Penn Life's agent completed a new application for insurance on May 1. This application was the same as the first, including a statement that Ruwitch's last physical examination had taken place in April of 1988. Penn Life relied on the information previously given by Ruwitch's phpsician and the company's physician in deciding whether to issue the life insurance policy. Ruwitch gave the agent a check for the first premium on May 1, and the policy was delivered to Ruwitch on May 25.

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[1] This first policy, though issued, was never delivered, and the premium check was returned to Dow Screw. Thus, the policy never took effect.

In the meantime, Ruwitch had undergone his annual physical on April 18, 1989. He did not list this physical on the May policy application. At this examination, Ruwitch's physician discovered blood in Ruwitch's stool.[2] Further examinations during May and June resulted in the discovery, on June 20, 1989, that Ruwitch had in incurable cancerous tumor in his colon. Ruwitch died of colon cancer in March of 1990. The evidence at trial showed that the tumor had been present since at least January of 1989.

After Ruwitch's death, Penn Life filed a declaratory judgment action in federal court seeking to have the policy declared void and unenforceable. Flora Ann Ruwitch, who is Ruwitch's widow and the trustee of the insurance trust, filed an action in state court on behalf of the trust claiming that Penn Life had breached the contract of insurance. Penn Life then removed the state action to federal court, and the two actions were consolidated for trial.

Penn Life asserted two defenses to payment of the policy. It asserted first that Ruwitch misrepresented in the application that he had never had cancer. It further asserted that the good health clause precluded the policy from ever going into effect, since Ruwitch was not actually in the state of health represented in the application, that is, the tumor was already present when the policy was delivered.

Penn Life moved for summary judgment and for a directed verdict based on the good health clause. The district court denied both motions. The court submitted the misrepresentation claim to the jury but refused to instruct the jury on Penn Life's good health clause defense. The jury found against Penn Life and returned a verdict for the amount of the policy. Penn Life then

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[2] The physician performed a screening test which analyzes a small sample of fecal material for "occult," or hidden, blood.

moved for judgment notwithstanding the verdict, again asserting the good health clause. The district court denied this motion, and Penn Life appeals.

II.

The standards for granting a motion for a directed verdict and for granting a motion for judgment notwithstanding the verdict are identical. *Bernoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1319 (8th Cir. 1987). We must 1) consider the evidence in the light most favorable to the nonmoving party, 2) assume any conflicts in the evidence were resolved in favor of the nonmoving party, 3) assume as proved all facts the nonmoving party's evidence tended to prove, and 4) give the nonmoving party the benefit of all favorable inferences reasonably to be drawn from the evidence. *Western Am., Inc. v. Aetna Casualty & Sur. Co.*, 915 F.2d 1181, 1183 (8th Cir. 1990). We will take the issue from the jury "only if all the evidence favors the movant and is 'susceptible of no reasonable inferences sustaining the position of the nonmoving party.' " *Toombs v. Bell*, 828 F.2d 481, 484 (8th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988)).

Penn Life contends that when applied to the undisputed facts in this case, Missouri law compels the entry of judgment in its favor on its good health clause defense. The trustee, on the other hand, contends that the statements Ruwitch made in the application were representations, not warranties. Thus, she argues, the good health clause is a defense only if Ruwitch fraudulently made false statements in the application.

We review do novo a district court's determination of state law. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991). The parties agree that Missouri law controls.

Missouri courts recognize and enforce good health clauses in insurance contracts. *See, e.g., Kirk v. Metropolitan Life Ins. Co.*, 81 S.W.2d 333, 343 (Mo. 1935); *Mahn v. American Life &*

Accident Ins. Co., 390 S.W.2d 573, 575 (Mo. Ct. App. 1965); *Lipel v. General Life Ins. Co.*, 192 S.W.2d 871, 875, (Mo. Ct. App. 1946). We have recognized such clauses as well. *See Security Benefit Life Ins. Co. v. Jackson*, 318 F.2d 846, 850 (8th Cir. 1963) (applying Missouri law). Some of the decisions characterize such clauses as warranties, *see Kirk*, 81 S.W.2d at 343; *Toler v. Atlanta Life Ins. Co.*, 248 S.W.2d 53, 55 (Mo. Ct. App. 1952); others view a good health clause as a conditions precedent to the effectiveness of the insurance contract. *See Mahn*, 390 S.W.2d at 576; *Lipel*, 192 S.W.2d at 875. We do not believe that designation of the good health clause in this contract as either a warranty or as a condition precedent will make a difference in the outcome in our decision. As we read the Missouri cases, those which have characterized a sound health clause as being in the nature of a warranty would have reached the same result had they characterized the clause as a condition precedent.

Applying the standard of review set forth above, we conclude that judgment should be entered for Penn Life. The evidence relevant to the good health clause defense is not disputed. The cancerous tumor had been present in Ruwitch's body since at least January of 1989, well before Ruwitch applied for insurance. The policy was delivered to Ruwitch on May 25, 1989, and the first premium had already been paid. Ruwitch's death was directly caused by the cancer. Thus, Penn Life is entitled to judgment as a matter of law.

The trustee points to the provision in the policy that information in the application would be regarded as "representations, not warranties." She contends this means that unless Ruwitch knew he had cancer at the time of delivery of the policy, the policy became effective and Penn Life must pay the benefits. When the contract is read was a whole, however, it is clear that it was Penn Life's intent to make the effectiveness of the policy conditional on the delivery of the policy while Ruwitch was still alive and in

good health. To construe the good health clause otherwise would render it superfluous. As stated by the *Kirk* court, "[h]ad the insurer known that the applicant for insurance was afflicted with a disease that probably would, as it did, soon cause . . . death, it doubtless would not have issued the policy." *Kirk*, 81 S.W.2d at 343. Thus, it makes no difference whether Ruwitch knew he had cancer at the time the policy was delivered. *See Security Benefit*, 318 F.2d at 850. "[I]t is the fact that is at issue, and not the question of good or bad faith." *Lipel*, 192 S.W.2d at 875.

Accordingly, the judgment is reversed, and the case is remanded to the district court with instructions to enter judgment for Penn Life.[3]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[3] Because we find that Penn Life's good health clause defense is valid, we need not reach its other claims that the district court erred by refusing to instruct the jury on the good health defense and by instructing the jury that Penn Life had to prove Ruwitch had "actual intent to deceive" when he failed to disclose the April 1989 physical examination to the company.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2943EMSL

Flora Ann Ruwitch, Trustee,
Appellee,

vs.

William Penn Life Assurance Company of America,
Appellant.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Arnold and Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 7, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Nos. 90-1312C(6) &
90-1709C(6)

FLORA ANN RUWITCH, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Plaintiff,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Defendant.

JUDGMENT

This action was tried before the Court and a jury, Honorable George F. Gunn, Jr., District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

It is ORDERED and ADJUDGED that the plaintiff, Flora Ann Ruwitch, recover from the defendant, William Penn Life Assurance Co. of America, the sum of Two Million ($2,000,000.00) dollars on the insurance policy and the sum of One Hundred Ninety-Five Thousand Eight Hundred and Twenty Dollars and Eighty Cents ($195,820.80) for interest, with interest thereon at the rate of 6.26% per annum and costs.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
United States District Judge

Dated at St. Louis, Missouri
this 9th day of April, 1991.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 90-1709C(6)
Consolidated With
90-1312C(6)

FLORA ANN RUWITCH, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Plaintiff,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Defendant.

ORDER

Upon consideration of defendant William Penn Life Assurance Company of America's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial,

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial shall be and it is denied.

Dated this 26th day of July, 1991.

/s/ George F. Gunn, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

32.20 [1981 Revision] Affirmative Defenses—Life Insurance—Breach of Warranty

Your verdict must be for defendant if you believe:

First, decedent represented in the application for the policy that (*here insert the statement, such as "he had not previously had heart trouble"*), and

Second, the representation was false, and

Third, such (*here insert a description of the matter referred to in the application*) contributed to the death of decedent.

Notes on Use (1969 New)

Caution. This instruction is appropriate only "where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy." See Committee Comment which follows.

Committee Comment (1969 New)

Where an action is brought to recover benefits under a life insurance policy, two distinct defenses may be available to the insurer. Insurer may defend on breach of a condition warranted to be true, and it may defend on the basis of misrepresentation of a material fact. When the defense is breach of a condition warranted to be true, the insurer may avoid liability without showing that the insured was guilty of fraud because the policy is *conditioned* upon the truth of the warranty or representation. To the contrary, the element of fraud must be established and submitted when the defense is one of false representation where no such warranty or policy condition exists.

The rule has been explained in *Dixon v. Business Men's Assurance Co.*, 365 Mo. 580, 285 S.W.2d 619, 625 (1955) as follows:

> The rule in this state, as we understand it, is that where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy, then the representations, if in fact untrue, will avoid the policy, though the representations were innocently made. This is so because such is the contract. The insurer is entitled to stand on the contract as written, and the innocence of the insured in making the representations is a matter of no concern. But where there is no such warranty or provision in the policy a misrepresentation, in order to avoid the policy must have been fraudulently made. This is the rule applicable to contracts generally, and we see no reason why an exception should be made with respect to insurance contracts. . . .
>
> Defendant invokes the rule, announced in the decisions, that the statute, section 5732, R.S.1929, Mo.St.Ann. § 5732, p. 4373 [RSMo 1949, § 376.589, V.A.M.S.], providing that no misrepresentations made in obtaining or securing a policy of life insurance shall be deemed material, or render the policy void, under the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, applies alike to warranties and representations, and draws no distinction between innocent and fraudulent misrepresentations. We are unable to see how this rule helps defendant. Obviously, the statute does not disturb the law of insurance contracts except in that it avoids defenses founded on misrepresentations when the matter misrepresented does not contribute to the contingency or event on which the

> policy is to be come due and payable. The purpose of the statute is to aid, not to hinder, the insured—to limit, not to extend, the rights of the insurer. Houston v. Metropolitan Life Ins. Co., 232 Mo.App. 195, 205, 97 S.W.2d 856, 860 [(1936)].

A similar requirement applicable to accident and health policies is in Section 376.783.3, RSMo 1986 which requires that false statements in policy applications cannot bar recovery unless such statements are material to the hazard assumed, or the acceptance of the risk.

Supreme Court, U.S.
FILED
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No. 92-366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORA ANN RUWITCH, TRUSTEE,
IRREVOCABLE INSURANCE TRUST AGREEMENT OF
WALLACE R. RUWITCH,
Petitioner,

v.

WILLIAM PENN LIFE ASSURANCE COMPANY
OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit was correct in its *de novo* analysis of Missouri's common law of contracts when it concluded that Ruwitch's life insurance policy was not effective because the undisputed facts at trial demonstrated that Ruwitch failed to satisfy a condition precedent under the policy's "good health" clause.

RULE 29.1 LIST

Respondent William Penn Life Assurance Company of America is the wholly-owned subsidiary of Banner Life Insurance Company which is wholly-owned by Legal and General of America which is, in turn, wholly-owned by Legal and General, p.l.c., a British company. The business affairs of Respondent are currently conducted by another subsidiary of the Legal and General family of companies, William Penn Life Insurance Company of New York.

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IN THE

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OCTOBER TERM, 1992

No. 92-366

FLORA ANN RUWITCH, TRUSTEE,
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WALLACE R. RUWITCH,
Petitioner,

v.

WILLIAM PENN LIFE ASSURANCE COMPANY
OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent William Penn Life Assurance Company of America ("Penn Life") respectfully prays that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

OPINIONS BELOW

Petitioner has attached, as Petitioner's Appendix B, the Eighth Circuit's Order denying the Trustee's Petition for Rehearing and Suggestion for Rehearing *en banc*. Petition at A-8. Petitioner, however, has attached an erroneous Order by the Court of Appeals which incorrectly shows that Chief Judge Richard S. Arnold voted

to grant rehearing. In fact, only Judge McMillian voted to grant rehearing. The erroneous Order cited by Petitioner was replaced by an Amended Order that is attached hereto as an Appendix to this Brief at p. 1a. The record, therefore, reflects that the panel unanimously denied the Petition for Rehearing, and the Court *en banc* denied the Petition for Rehearing by a vote of 10-1.

STATEMENT

Wallace Ruwitch was a wealthy and sophisticated businessman who applied for and received a $2,000,000 life insurance policy from Penn Life with a first year premium of $2,490.00. Penn Life's Appendix ("App.") filed with the Eighth Circuit Court of Appeals at 117, 187-190. Ruwitch decided to purchase the insurance after evaluating the results of his agent's analysis of policies offered by competing companies. App. at 77-78. Robert L. Rosenheim, Ruwitch's insurance agent, acknowledged that some companies have "better rates" and some have "better contracts." App. at 159. Ruwitch, however, decided to purchase the Penn Life policy based on its low cost, not its contractual provisions. App. at 77-78, 160. The beneficiary of the policy was designated as Wallace Ruwitch's irrevocable insurance trust agreement.

Ruwitch's life insurance policy contained an unambiguous "good health" clause that states as follows:

> [N]O INSURANCE SHALL TAKE EFFECT
>
> UNLESS AND UNTIL
>
> THE POLICY HAS BEEN PHYSICALLY DELIVERED
>
> AND THE FIRST FULL PREMIUM PAID
>
> DURING THE LIFETIME OF THE INSURED
>
> AND THEN ONLY IF THE PERSON TO BE INSURED
>
> IS ACTUALLY IN THE STATE OF HEALTH AND INSURABILITY
>
> REPRESENTED IN PARTS I AND II OF THIS APPLICATION.

App. at 130 (emphasis and diagramming added). *See also* Appendix to Petition for Writ of Certiorari ("Pet. App.") at A-3.

The undisputed facts are as follows:

1. Ruwitch had colon cancer in January, 1989, at least four months before he received his life insurance policy from Penn Life on May 25, 1989. App. at 182(A)-183, 198, 236-237, 240-241. Pet. App. at A-4.

2. Ruwitch represented to Penn Life on Part II of his life insurance application that he did not have cancer. App. at 131. Pet. App. at A-2.

3. Ruwitch died as a result of colon cancer on March 7, 1990, approximately ten months after he received his life insurance policy. App. at 238, 239, 241. Pet. App. at A-4.

The District Court denied, without comment, Respondent's motion for summary judgment, directed verdict, and judgment notwithstanding the verdict, each of which asked the Court to enforce the plain language of Ruwitch's insurance policy and hold that his insurance was not effective as a matter of law. Pet. App. at A-4, A-5. Respondent appealed the District Court's judgment that was based on a jury verdict for the plaintiff trustee.

Based on the uncontroverted facts adduced at trial and its *de novo* application of Missouri law, the Eighth Circuit held that the "good health" clause precluded Ruwitch's life insurance from being effective because Ruwitch was not "actually in the state of health" represented in the application. Pet. App. at A-5 to A-6. The Court, therefore, reversed the judgment and directed the District Court to enter judgment for Penn Life. Pet. App. at A-7.

REASONS WHY THE PETITION SHOULD BE DENIED

I. INTRODUCTION.

This case turns on the application of state common law to the unique facts presented at trial. No constitutional or federal question is presented. The Eighth Circuit opinion is well supported by Missouri law. There is no state or federal opinion that conflicts with the Eighth Circuit's holding. Moreover, this case does not involve any important policy or procedural issues.

If the Court reviews this case, hundreds and perhaps thousands of parties would seek review of decisions based solely on state law. This Court should not waste its precious and limited judicial resources to review a well reasoned opinion interpreting the "good health" clause of a life insurance contract based upon Missouri's common law. The Petition, therefore, should be denied.

II. THE EIGHTH CIRCUIT PROPERLY FOLLOWED *SALVE REGINA COLLEGE* IN ITS DE NOVO ANALYSIS OF MISSOURI LAW.

The Court of Appeals properly applied a *de novo* standard of review to the District Court's refusal to enforce the good health clause in Penn Life's life insurance contract. Pet. App. at A-5 (citing *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991)). This review was particularly appropriate in this case when the District Court failed to write an opinion or explain its decision on the record despite Penn Life's exhaustive analysis of its defense under the good health clause in its motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. *See Salve Regina College*, 111 S. Ct. at 1222-1225. *See also id.* at 1222 ("Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions.").

This Court should reject Petitioner's argument that the Eighth Circuit's application of *Salve Regina College* vio-

lates the *Erie* doctrine first enunciated by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). This Court's decision in *Salve Regina College* was firmly grounded in the principles enunciated earlier in *Erie*, which required that federal diversity courts follow state substantive law rather than an ephemeral "federal general common law." 304 U.S. at 74-76. As the Court observed, "appellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in *Erie*." 111 S. Ct. at 1222. *Salve Regina College* furthers the aims of *Erie* by requiring a review of substantive state law principles at the appellate level to insure that the district courts are properly and uniformly adhering to state law. *Id.* at 1223-1224. This view is based, in part, on this Court's observation that, as compared with district courts, the courts of appeals are better positioned to address legal questions with the level of reflection and deliberation which such questions require. *Id.* at 1221.

This Court also should reject Petitioner's "alternative" suggestion that this Court should reconsider its March, 1991, decision in *Salve Regina College* and allow courts of appeals to grant some deference to the rulings of trial courts on matters of state law. This case demonstrates the reasons that *Salve Regina College* was correctly decided. The District Court did not file a written opinion or make a statement on the record explaining why it was refusing to enforce the "good health" clause in Ruwitch's life insurance policy. Thus, the Court of Appeals was compelled to conduct a *de novo* review because the District Court did not articulate a principled basis under Missouri law for its rejection of Respondent's contractual defense.

Furthermore, Petitioner's argument is irrelevant to the outcome of this case. Even under the law prior to *Salve Regina College*, the Court of Appeals would have been required to analyze Missouri law, enforce the terms of

the "good health" clause, and reverse the District Court's judgment. *See e.g., Salve Regina College*, 111 S. Ct. at 1220, 1221 (collecting cases); *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (requiring Court of Appeals to overturn District Court's ruling on state law question if it is "fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion").

III. THE EIGHTH CIRCUIT'S ENFORCEMENT OF THE "GOOD HEALTH" CLAUSE IN PENN LIFE'S INSURANCE POLICY IS REQUIRED BY THE OPINIONS OF THE MISSOURI SUPREME COURT AND THE MISSOURI COURT OF APPEALS.

The Eighth Circuit correctly observed that "Missouri courts recognize and enforce good health clauses in insurance contracts." Pet. App. at A-5, A-6. The controlling cases on which the Eighth Circuit relied include: *Kirk v. Metropolitan Life Insurance Co.*, 81 S.W.2d 333, 343 (Mo. 1935) ("The insurer agreed to assume liability only upon condition that the insured should *be*, not merely believe herself to be, in sound health. . . .") (emphasis in original); *Lipel v. General American Life Insurance Co.*, 192 S.W.2d 871 (Mo. Ct. App. 1946) (insurer's "good health" defense is based on whether insured is in fact in good health and not on whether the insured knew his representation was false); *Mahn v. American Life & Accident Insurance Co.*, 390 S.W.2d 573, 576 (Mo. Ct. App. 1965) ("'good health' clauses in life insurance policies are valid and are considered conditions precedent to the policy's becoming effective"); *Security Benefit Life Insurance Co. v. Jackson*, 318 F.2d 846, 850 (8th Cir. 1963) (applying Missouri law) ("[i]t makes no difference in the application of the good health clause whether or not the insured knew at the time the insurance became effective whether he had a disease which might contribute to his death.").

The Petitioner trustee cannot distinguish any of these controlling cases, which support the Eighth Circuit's hold-

ing that Penn Life is entitled to judgment as a matter of law. Indeed, the trustee does not cite any of these cases in her Petition to this Court. Instead, as will be demonstrated below, the trustee seeks review by this Court based on a string of inapposite cases that interpret insurance contracts that do not even contain a "good health" clause.

IV. THIS COURT SHOULD REJECT THE TRUSTEE'S CONSTRUCTION THEORY THAT NEGATES OR RENDERS SUPERFLUOUS THE "GOOD HEALTH" CLAUSE.

The premise of the trustee's construction theory is that the "good health" clause requires Penn Life to prove that Ruwitch knew he had cancer when he completed the insurance application. The plain language of the clause, however, does not require Penn Life to prove that Ruwitch had knowledge of his terminal illness. Pet. App. at A-7.

As reflected by the language of the good health clause, Penn Life only agreed to offer Ruwitch $2,000,000 of life insurance on the reasonable assumption that Ruwitch did not have a pre-existing terminal illness. The Court of Appeals correctly enforced the contractual bargain between the parties. The trustee is effectively requesting this Court to negate or refuse to enforce the "good health" clause. The Eighth Circuit properly refused to accept the trustee's theory that violates all accepted principles of contract law. Pet. App. at A-6.

The trustee argues that the words "represented . . . in the application" should be construed to make the good health clause operative only if Ruwitch knew that he had cancer when he completed the application. This construction is improper because it isolates the word "representation" and ignores the other words in the sentence that unambiguously state the policy only is effective if Ruwitch "*is actually in the state of health* represented in . . . the application." (emphasis added). The word "representa-

tion" is used merely as a reference to the specific statements of Ruwitch's health contained in the application.

The precise language in Ruwitch's policy is a substantial improvement over the language in some policies that require a determination of whether the insured is in "good health" when the policy is delivered. In close cases, the ambiguity of the phrase "good health" can create confusion for the court. But there can be no doubt what the parties intended in the case at bar. Ruwitch represented in his application that he did not have cancer. He was not "actually" in this "state of health" when the policy was delivered. The policy, therefore, was not effective.

The trustee also argues that the "good health" clause is modified by two independent provisions in the insurance contract. The first requires the insured to answer questions in the application "to the best of [his or her] knowledge and belief." The second provides that "[s]tatements made in the application will be considered representations and not warranties."

The "misrepresentation" provisions, however, constitute separate defenses that apply to circumstances that are different than those to which the "good health" clause applies. The good health clause, in which Ruwitch's knowledge of his cancer is not relevant, applies to Ruwitch's *present* state of health at the time the policy was *delivered* to him. *See* Pet. App. at A-3. On the other hand, the misrepresentation provisions, in which the issue of Ruwitch's knowledge of his cancer is relevant, apply to Ruwitch's *past* state of health at the time he *applied* for the life insurance.

The importance of these distinctions can be demonstrated by considering hypothetical applications of Penn Life's good health clause and misrepresentations defenses. For example, suppose that an insured had cancer that had been cured or an ulcer that had healed but did not disclose this information in the insurance application.

Penn Life would not have a defense under the "good health" clause because when the policy was delivered, the insured was "actually" in the state of health represented in the application—that is, cancer-free or ulcer-free. Penn Life, however, would have a viable misrepresentation defense to void the policy based on the insured's material misrepresentation of important past (as opposed to present) health information.

Timing is also critical to Penn Life's good health clause defense as compared with its separate misrepresentation defense. The "good health" clause applies to Ruwitch's "actual state of health" when the policy is *delivered*, not when Ruwitch represented his health at the time he completed the application. When Ruwitch signed his insurance application, it would have been logically impossible for him to know with certainty the state of his health in the future when he anticipated receiving the life insurance policy. Yet the trustee's construction of the "good health" clause would permit Ruwitch to have such superhuman knowledge of the future.

In *Lipel v. General American Life Insurance Co.*, the Missouri Court of Appeals recognized the difference between a good health clause and a separate "misrepresentation not warranty" provision in a life insurance policy. 871 S.W.2d at 875. Rejecting the identical construction theory the trustee is proposing, the Court held that "this ["misrepresentation not warranty" provision] in no manner adds to or takes from the 'sound health' clause. . . ." *Id.* The Eighth Circuit properly followed this controlling precedent, which the trustee does not discuss in her Petition. Pet. App. at A-6, A-7.

The trustee complains that the Eighth Circuit erred when it concluded that "[w]e do not believe that designation of the good health clause in this contract as either a warranty or a condition precedent will make a difference in the outcome in our decision." Pet. App. at A-6. The Eighth Circuit's conclusion, however, was sensible and

well supported by the relevant case-law ignored entirely by the trustee. *Id.* (citing case-law). The failure to satisfy a condition precedent is similar to a warranty in that in both instances the prospective insured's knowledge of his terminal illness is not relevant.

The Eighth Circuit's opinion is consistent with the only other court that has interpreted the unique "good health" clause in Ruwitch's life insurance policy. *William Penn Life Assurance Co. of America v. Brown Transfer and Storage Co. Inc.*, No. 88-6080-SJ-6 (W.D. Mo. January 1990) (on file with the Eighth Circuit Clerk). Relying on the unambiguous language of the "good health" and Missouri cases such as *Kirk* and *Lipel*, Chief District Judge Sachs adopted a construction analysis that mirrors the Eighth Circuit's holding in this appeal. *Id.* The Court also rejected the same construction theory proposed by the trustee. *Id.*

V. THE TRUSTEE RELIES ON NUMEROUS INAPPOSITE CASES THAT INVOLVE INSURANCE CONTRACTS THAT DO NOT EVEN CONTAIN A "GOOD HEALTH" CLAUSE.

The trustee does not cite a single case in Missouri or any other jurisdiction that supports her theory that an insurer's misrepresentation defense can be construed to modify its separate contractual defense under a "good health" clause. In fact, nearly every case cited in the trustee's Petition involves insurance contracts that do not even contain a "good health" clause. For example, Petitioner cites this Court's 1884 decision that interprets a Pennsylvania insurance contract that did not have a "good health" clause. *Moulor v. American Life Insurance Co.*, 111 U.S. 335 (1884).

Likewise, none of the other Eighth Circuit cases cited by Petitioner construe contracts that have a "good health" clause. *New York Life Insurance Co. v. Calhoun*, 97 F.2d 896 (8th Cir. 1938); *Howard v. Russell Stover Candies*,

649 F.2d 620 (8th Cir. 1981) (interpreting a general liability insurance policy); *Hampton Foods, Inc. v. Aetna Casualty and Surety Co.*, 787 F.2d 349 (8th Cir. 1986) (interpreting a personal property insurance policy).

Petitioner cites five Missouri cases but not one of these cases construes a life insurance policy containing a "good health" clause. *See, e.g., Houston v. Metropolitan Life Insurance Co.*, 97 S.W.2d 856 (Mo. Ct. App. 1936); *Cohen v. Metropolitan Life Insurance Co.*, 444 S.W.2d 498 (Mo. Ct. App. 1969); *Scheutzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d 135 (Mo. Ct. App. 1942); *Dixon v. Business Men's Assurance Co.*, 285 S.W.2d 619 (Mo. 1955) (*en banc*); *Bohm v. Fidelity and Casualty Co. of New York*, 399 S.W.2d 450 (Mo. Ct. App. 1966).

Petitioner's reliance upon *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990) is similarly misplaced. The Court's opinion interprets Florida, not Missouri law, and it does not construe or reference a "good health" clause at issue in the case at bar. *See also Skinner v. Aetna Life and Casualty*, 804 F.2d 148 (D.C. Cir. 1986) (applying D.C. law).

There are no opinions of this Court that have any relevance to the issue of Missouri law in this case involving the meaning and enforcement of a "good health" clause in a life insurance contract. The trustee chose not to mention the one Eighth Circuit opinion which is relevant to the instant appeal. *Security Benefit Life Insurance Co. v. Jackson*, 318 F.2d 846 (8th Cir. 1963) (construing good health clause in life insurance policy and applying Missouri law). This case directly supports the holding below that is based on the unambiguous language of the good health clause, the relevant Missouri case-law, and the undisputed fact that Ruwitch had cancer several months before the policy was delivered to him. Penn Life, therefore, is entitled to a judgment as a matter of law. *Id.* at 850-852. *See also* Pet. App. at A-6, A-7.

VI. PETITIONER HAS WAIVED HER ARGUMENT THAT THE POLICY AT ISSUE WAS AMBIGUOUS; IN ANY EVENT, THE ARGUMENT HAS NO MERIT.

The trustee errs in not focusing on the panel's holding that "[w]hen the contract is read as a whole, however, it is clear that it was Penn Life's intent to make the effectiveness of the policy conditional on the delivery of the policy while Ruwitch was still alive and in good health." Pet. App. at A-6, A-7.

The trustee requests the panel to set aside its decision to enforce the plain language of the good faith clause and instead conclude that the clause is ambiguous and should be construed against Penn Life. This Court should not consider the trustee's new argument on appeal. *See, e.g., Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 709 (8th Cir. 1979).

Penn Life had no notice of the issue in the pre-trial proceedings and therefore had no reason to develop an evidentiary record of the parol evidence that would have been admissible at trial if the jury had been permitted to resolve the alleged ambiguity. Penn Life, therefore, would be prejudiced if this Court permitted plaintiff to raise the ambiguity issue on appeal. Even if considered, however, the trustee's argument should be rejected because it is premised on a legally unacceptable argument that would permit the Court to negate or render superfluous the unambiguous good health clause in the life insurance contract. *See* Pet. App. at 7.

In addition, Petitioner urges, for the first time, that the Court of Appeals did not apply Missouri's so-called "reasonable expectations" doctrine to this case. This Court should reject this ground for review because it was not properly presented in the lower courts. *Browning-Ferris Industries*, 109 S. Ct. at 2921. In any event, there is no merit to Petitioner's argument because the doctrine does

not apply to negate the enforcement of the unambiguous language of an insurance policy.

The new cases cited by Petitioner are also inapposite. *Estrin Construction Co., Inc. v. Aetna Casualty and Surety Co.*, 612 S.W.2d 413 (Mo. Ct. App. 1981) involved a question regarding the insurer's duty to defend under a Comprehensive General Liability policy, not a life insurance contract with a "good health" clause. The *Estrin* Court used the "reasonable expectations" doctrine to overcome an acknowledged ambiguity in the policy on the basis that the insured had no reasonable expectation that there was coverage. *Id.* at 420. In contrast, the "good health" clause in Ruwitch's life insurance policy is not ambiguous and must be enforced.

Petitioner further attempts to support her new theory of recovery by citing *Rodriguez v. General Accident Insurance Co.*, 808 S.W.2d 379 (Mo. 1991) (*en banc*) and *Robin v. Blue Cross Hospital Services, Inc.*, 637 S.W.2d 695 (Mo. 1982) (*en banc*). These cases, however, are inapposite because the Missouri Supreme Court refused to apply the "reasonable expectations" doctrine.

The Eighth Circuit's well-reasoned opinion is supported by the unique facts of this case and Missouri's common law principles that enforce "good health" clauses in life insurance contracts. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("We emphasize, however, that, standing alone, a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."). No principled basis exists for this Court to review the judgment of the Court of Appeals.

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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September 22, 1992

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2943EM

FLORA ANN RUWITCH, TRUSTEE,
Appellee,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

AMENDED ORDER

The court's order of July 7, 1992, is amended as follows:

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 10, 1992

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

FILED
OCT 6 1992
OFFICE OF THE CLERK

No. 92-366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORA ANN RUWITCH, Trustee,
Irrevocable Trust Agreement of
WALLACE R. RUWITCH,
Petitioner,

vs.

WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 93-366

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REASONS WHY THE COURT SHOULD GRANT THE PETITION

I. THE COURT OF APPEALS' HOLDING WAS A PATENTLY IMPROPER APPLICATION OF THE GOVERNING MISSOURI LAW; RESPONDENT'S ARGUMENT TO THE CONTRARY RESTS ON A MISLEADING ATTEMPT TO READ OUT OF THE POLICY THE KEY PROVISIONS THAT MANDATE A POLICY CONSTRUCTION IN FAVOR OF PETITIONER.

The basic fallacy in Respondent's argument is shown by its misleading "Statement", which inexplicably directs the Court's attention to only one of the three policy clauses that are appli-

cable here. These clauses are contained in Parts I and II of the Application and on page 4 of the policy itself, and are attached as Appendix A. They read in part as follows.

From Part I of the Application:

> The statements contained here and in Part II of this application . . . are true to the **best of my knowledge and belief** . . . (Emphasis supplied).
>
> [N]o insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability **represented** in Parts I and II of this application. (Emphasis supplied).

Part II of the Application, the form used by William Penn where (as here) there was a physical examination of the applicant, contained the following:

> The statements and answers are true to the **best of my knowledge and belief** and are made for the purpose of inducing the Company to issue insurance on my life. (Emphasis added.)

Finally, the relevant language from the policy itself provides:

> . . . . A copy of the application is attached to the contract when issued; No statement will be used by us to void the contract or to defend against a claim presented under the contract, unless that statement is contained in the attached copy of the application. **Statements in the application will be considered representations and not warranties**. (Emphasis added.)

The Court of Appeals cited these three clauses, but then ignored the effect of the limited knowledge and belief representation and the non-warranty clause and construed what it deemed was a "good health" clause as if it were a warranty. In doing so the Court of Appeals totally ignored two out of the three relevant clauses and missed entirely the fact that the "good health" clause

was only based upon what was "represented". The Court's construction that the "good health" clause is an absolute one is totally inconsistent with these limiting clauses.

II. THE COURT OF APPEALS FAILED TO APPLY THE ENTIRE BODY OF MISSOURI LAW AS REQUIRED BY *ERIE RAILROAD; SALVE REGINA* GAVE IT NO LICENSE TO SUBVERT THE LANGUAGE OF THIS POLICY BASED UPON A TOKEN DE NOVO REVIEW.

While the Court of Appeals purported to apply the *de novo* review standard prescribed in *Salve Regina*[1], it wholly failed to follow the underlying rule of *Erie Railroad*[2] that in a diversity case it is incumbent upon Federal Courts to employ the entire body of State law applicable to the particular controversy.

It ignored the non-warranty and knowledge and belief cases decided by the Missouri Appellate Courts. It also ignored the significant rulings in the District Court by the Honorable George G. Gunn. Judge Gunn was a former Justice of the Missouri Court of Appeals (Eastern District) and the Missouri Supreme Court. Respondent is in error when it states that Judge Gunn did not issue any opinion in the case. He did. Attached at Appendix B is a copy of the Opinion he rendered in overruling the Motions for Summary Judgment filed by the parties, including Respondent's Motion based upon its construction of the "good health" clause in the policy. Judge Gunn also overruled Respondent's motion for a directed verdict and its motion for judgment N.O.V., which were both based upon its improper warranty construction of the "good health" clause.

Respondent has totally eschewed any discussion of this Court's applicable decisions in *Ruhlin* and *Stoner*,[3] which established

---

[1] *Salve Regina College v. Russell*, __ U.S. __ , 111 S.Ct. 1217 (1991).

[2] *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

[3] *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202 (1938). *Stoner v. New York Life Insurance Company*, 311U.S. 464 (1940).

that a basic function of this Court is to correct error where a Court of Appeals abrogates its duty under *Erie*. Here, this Court could either choose to reverse *per curiam* or to remand the case to the Court of Appeals for proper review, but this Court's obligation to correct the Court of Appeals' failure to follow and apply *Erie* is clear.

This Court might determine that the words "*de novo*" used in *Salve Regina* give the courts of appeals too much latitude and that it is time to establish that the rules of *Erie Railroad*, *Ruhlin* and *Stoner* are alive, well, and binding upon the courts of appeals. A court of appeals, especially a panel consisting of three judges who were not practicing lawyers or trial judges in the applicable state, should give at least *some* weight to a ruling below, especially one by a District Judge, who has been a Judge not only on the State's Appellate Court but a Justice of the State's Supreme Court.

III. THE EIGHTH CIRCUIT'S CONSTRUCTION OF THE "GOOD HEALTH" CLAUSE IS NOT SUPPORTED BY THE SELECTED CASES CITED BY RESPONDENT AND THE COURT.

In each of the four cited cases relied upon by the Court of Appeals and cited by the Respondent, there was a classic "good health" clause which stated just that — that the insured warranted that he was in good health at the time the policy was delivered.[4] In *Kirk*, for example, the good health provision provided that:

> No obligation shall be assumed by the Company prior to the date hereof nor unless on said date the insured is alive and in sound health. Should the proposed insured not be alive

[4] *Kirk v. Metropolitan Life Insurance Co.*, 81 S.W.2d 333, 343 (Mo. 1935); *Lipel v. General American Life Insurance Co.*, 192 S.W.2d 871 (Mo.App. 1946); *Mahn v. American Life & Accident Insurance Co.*, 390 S.W.2d 573, 576 (Mo.App. 1965); *Security Benefit Life Insurance Co. v. Jackson*, 318 F.2d 846, 850 (8th Cir. 1963).

> or not be in sound health on the date hereof, any amount paid to the Company premiums hereon shall be returned.

Id. at 335. The Supreme Court of Missouri noted that its ruling was based upon the absolute policy language:

> The insurer agreed to assume liability only upon condition that the insured should *be*, not merely believe herself to be, in sound health when the policy was issued, and the premium was fixed on that basis.

Id. at 343. This obvious distinction was ignored or overlooked by the Court of Appeals.

In *Lipel*, the Court pointed out the following concerning the good health clause:

> In the application, he was asked, "Are you now in good health?" to which he answered, "Yes"; he was further asked if he had cancers, tumors or ulcers of any kind, to which he answered "No".

Id. at 875. The court further noted that: "The application on October 31, 1942, represented that Joseph H. Lipel was in good health and had never suffered from cancer." *Id.* at 876.

Mahn and *Jackson* are similarly distinguishable. None of those cases contain the three relevant clauses in this policy: (1)that the insured's statements about his health were based only upon the "best of his knowledge and belief", (2)that the clause itself was based upon what he "represented" and (3)that the policy expressly provided that statements in the application would only be considered (by Respondent) as "representations and not warranties." Thus, when Respondent states (Br.6) that "Petitioner cannot distinguish any of these" cases, it is simply wrong.

The unreported District Court case in *William Penn Life Assurance Co. of America v. Brown Transfer and Storage, Inc.*, cited at pages 9 and 10 of Respondent's Brief is also totally inapplicable because the evidence there showed that the insured,

in submitting his final application, had actual knowledge of his malady.

IV. THE CASES CITED BY PETITIONER AND IGNORED BY THE COURT OF APPEALS ARE CONTROLLING AND REQUIRED RESPONDENT TO PROVE KNOWLEDGE.

Missouri law recognizes only two defenses that a life insurer can raise in this type of case: misrepresentation and breach of warranty or condition. It was the duty of the Court to determine whether the language used in the application is a representation or a warranty. *See, e.g., Cohen v. Metropolitan Life Insurance Co.*, 444 S.W.2d 498, 503 (Mo.App. 1969). Where there is a clause in the policy specifically negating warranty, that construction question should be an easy one. *See Houston v. Metropolitan Life Insurance Co.*, 97 S.W.2d 856, 862 (Mo.App. 1936), where the Court asked rhetorically what rule of construction would permit it to convert non-warranty language into a warranty or condition voiding the policy.

These cases are supported by the Missouri Supreme Court case of *Dixon v. Businessmen's Assurance Company of America*, 285 S.W.2d 619 (Mo. en banc 1955) cited on page 17 of the Petition and also *Toler v. Missouri Insurance Co.*, 243 S.W.2d 78 (Mo.App. 1951) and *Dyer v. Kansas City Life Insurance Co.*, 188 S.W.2d 758 (Mo.App. 1945), which were cited by Petitioner, but were also ignored by the Court of Appeals, as was the Eighth Circuit's own prior case of *Pyramid Life Insurance Co. v. Curry*, 291 F.2d 411 (8th Cir. 1961).

Recognizing that these cases are binding precedents, Respondent in its Brief (p.8) argues that there is somehow a difference between a "good health" defense and a misrepresentation defense, arguing that a representation relates to an applicant's past state of health whereas a "good health" clause (that Respondent claims makes knowledge irrelevant) concerns his condition at the time of the delivery of the policy. There are these problems

with that argument: (1) the application itself deals with past *and* the present; the representations were as of the time they were made; (2) the representations were expressly made only upon the insured's knowledge and belief; (3) this was the only state of health "represented" in the "good health" clause contained in the policy, and (4) the policy expressly provided that statements in the application were representations and not warranties.

V. THE CASES CONSTRUING POLICIES WITH "KNOWLEDGE AND BELIEF" PROVISIONS REQUIRE A SHOWING OF KNOWLEDGE OR FALSITY.

The express provisions of Respondent's own application only required the applicant to answer questions about his health based upon his knowledge and belief. That is why Respondent had Mr. Ruwitch examined by a physician. Accordingly, Mr.Ruwitch only represented that "to the best of his knowledge and belief", he did not have cancer. Respondent's "Statement" is inaccurate when it says on page 3 that Mr. Ruwitch "represented to Penn Life on Part II of his life insurance application that he did not have cancer." This statement is simply false. Mr.Ruwitch made no such representation. All he stated was that to the **"best of his knowledge and belief"**, he did not have cancer. Respondents misstatement permeates not only its Brief but also the Opinion of the Court of Appeals.

Respondent fails to cite a single case which holds or suggests that a "good health" clause based upon what the insured "represented" abrogates the express requirement of falsity under Missouri law or that Mr.Ruwitch's representation that "to the best of his knowledge and belief" he did not have cancer was a false statement. To the contrary, the cases cited by Petitioner unmistakably establish that this requirement of falsity applies regardless of whether the case is treated as a warranty case or a misrepresentation case. *See, e.g., Dixon v. Business Men's Assurance Co.*, 365 Mo. 580, 285 S.W.2d 619 (1985); *Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d at 139;

New York Life Insurance Company v. Calhoun, 97 F.2d 896, 898 (8th Cir. 1938). *See also* cases cited in the Petition, pages 18-19.

Respondent attempts to avoid this clear requirement of falsity by simply ignoring it. If the *Erie* doctrine has any meaning, it clearly requires that a defendant in asserting an affirmative defense must satisfy each and every necessary element in order to prevail on that defense. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1948) ("Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court.").

Erie required that Respondent prove that Mr. Ruwitch made a material statement in the application that was false, *i.e* a representation that was contrary to his knowledge and belief. There was no such evidence. The representations of Mr. Ruwitch were true. When his tumor was ultimately discovered his doctors were surprised and he and his family were devastated.

VI. PETITIONER HAS NOT WAIVED HER ARGUMENT THAT AT THE VERY LEAST THE POLICY IS AMBIGUOUS AND TO AVOID A FORFEITURE THE POLICY UNDER MISSOURI LAW MUST BE CONSTRUED IN FAVOR OF PETITIONER.

Recognizing perhaps the merit of Petitioner's argument that the Court of Appeals' ruling construes any ambiguity in the policy in favor of the insurer rather than the insured, in contravention of well-established Missouri law, Respondent argues without basis that this contention was waived because it was not presented to the District Court. In fact, Motions for Summary Judgment were filed and both sides claimed that the policy was clear in accordance with their particular construction. In that briefing, however, Petitioner cited the *Cohen*, *Schuetzel* and *Dyer* cases cited on pages 21 and 22 of this Petition, and the applicable rules of construction that under Missouri law an insurance policy is strictly construed against the insurer, especially when the insurer seeks to avoid coverage or enforce a

policy forfeiture provision. These cases were also cited in Petitioner's Memorandum in Opposition to Respondent's Motion for Judgment N.O.V.

In the Court of Appeals, these cases and others were cited in support of this well-established Missouri rule that ambiguity in an insurance policy must be construed against the insurer. The Court of Appeals, without discussion of any of these cases, ignored this rule and stood the law on its head when it in effect held that this policy should be construed in favor of the insurer. Thus, Petitioner's valid argument was preserved at all stages of the proceeding.

VII. RESPONDENT HAS IGNORED THE FACT THAT THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE ELEVENTH CIRCUIT CONSTRUING THIS SAME POLICY.

Respondent's cryptic dismissal (Br. 11) of the case of *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990) does not explain the fact that two federal courts of appeal now have rendered two diametrically opposed Opinions construing the same insurance policy. The *Sands* case requires proof that the insured had knowledge of the subject malady because of the "knowledge and belief" qualifier. The Court of Appeals here casually held that knowledge is irrelevant and that William Penn had no duty to prove falsity despite the presence of the very same "knowledge and belief" qualifier. This is not just a direct conflict on the law, but a judicial conflict on the meaning of the same insurance policy.

VIII. RESPONDENT'S ARGUMENT BASED ON CONSERVATION OF JUDICIAL RESOURCES IS WITHOUT MERIT.

Respondent's unsubstantiated prediction (Br. at 4) that by this Court's correction of this grave injustice there will be a proliferation of petitions to review state law questions rings hollow. The

opposite is true. Granting certiorari here to review the questions presented by Petitioner will send a strong message to the Court of Appeals, reminding them of their duty under the *Erie Railroad* case to apply the entire body of state law in diversity cases and to not render decisions based upon a misconstruction of a contract purportedly based upon some, but not the entire body of the applicable state law. This will reduce the tendency of insurers to forum shop and file their meritless declaratory judgment suits in the federal courts.

CONCLUSION

The decision of the Court of Appeals is simply wrong. This grave injustice should be remedied. The Constitution and the Congress have granted the federal courts diversity jurisdiction. This Court has mandated in *Erie* that the federal courts follow and properly apply the entire body of state law in these cases. The outright reversal of the Court of Appeals in this case is an abrogation of that rule. This Court is the only forum Mrs. Ruwitch has to obtain the simple justice to which she is entitled.

The Writ should issue.

Respectfully submitted,

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Attorneys for Flora Ann Ruwitch

APPENDIX A

P -2T I Application for life insurance to: WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA

HOME OFFICE INDIANAPOLIS, INDIA
AD INISTRATIVE OFFICE 2 CORPORATE PLACE SOUTH PI -TAWAY N J 08854

Assigned Policy No. _____

COMPLETE FOR ALL POLICIES (Please Print) –

1. a. NAME
FIRST WALLACE
MIDDLE R
LAST RULITCH

Male ☒ Female ☐

b. ☐ Single ☒ Married ☐ Divorced ☐ Widowed ☐ Separated

c. DATE OF BIRTH (month day year): 10 29 38
d. AGE (nearest birthday): 50
e. BIRTHPLACE (state): ILL (country): USA

f. SOCIAL SECURITY OR TAX NO. 334-38-2517

2. SEND ALL MAIL TO OWNER AT ADDRESS IN ☐ 3a ☐ 3b ☐ 9

3. a. RESIDENCE - NUMBER AND STREET
212 NANTUCKET LANE

CITY OR TOWN: STILLWATER | STATE: MO | ZIP CODE: 63011 3124

Questions 3b & c apply to proposed insured if age 15 or over.
To owner or payor if proposed insured under age 15.

b. BUSINESS ADDRESS With present employer .... 0 ..... yrs.
Employer DCW SCREW PRODUCTS, INC.
No. & Street 3624 S. BROADWAY
City ST. LOUIS State MO Zip 63111
Nature of Business STEEL MACHINE PRODUCTS

c. OCCUPATION (All, if more than one)
PRESIDENT
Duties (Describe) MANAGEMENT - CEO

4. HAS ANY PERSON PROPOSED FOR INSURANCE:

	Yes	No
a. engaged or intend to engage in hang gliding, racing, scuba diving, sky diving?	☐	☒
b. had driver's license restricted, revoked or suspended? If Yes, give driver's ID #	☐	☒
c. other life insurance applications pending?	☐	☒
d. ever had life or health insurance declined, modified or rated?	☐	☒
e. any intention of traveling or residing outside the country?	☐	☒
f. any intention of replacing or changing any life insurance or annuity policy in force in this or any other company?	☐	☒
If any of 4a through 4f are answered Yes, give full details in REMARKS		
g. taken within five years or intend to take flights other than as a fare-paying passenger on scheduled airlines?	☐	☒
If Yes, complete Aviation Questionnaire		
5. Have you smoked cigarettes in the past 12 months?	☐	☒

6. a. PLAN PENN TERM II - NON SMOKER

b. AMOUNT $ 2,000,000 ☐ NON-PAR ☐ PAR

c. PREMIUMS PAYABLE ☒ Annual ☐ Semi-annual ☐ Quarterly
☐ Auto Bank Ch. ☐ Mo. ☐ Other _____

d. AUTOMATIC PREMIUM LOAN, if available ☐ Yes ☐ No

e. 10 YEAR LEVEL TERM RIDER – AMOUNT $ _____
FAMILY INC. RIDER _____ (YRS.) $ _____ MONTHLY INC
OTHER BENEFITS (Check Those Desired)
☐ Accident Indemnity ☐ Payor Death and Disability
Amount $ _____ ☐ Waiver of Premium
☐ Family Plan Rider ___ Units ☐ Children's Rider _____ Units
☐ Annual Renewable Term Rider
☐ Guaranteed Purchase Option – Amount $ _____
☐ Other _____

f. IF PARTICIPATING, USE OF DIVIDENDS (If not checked, paid u additions automatic)
☐ Cash ☐ Deposit at Interest
☐ Reduce Premium ☐ Paid Up Additions
☐ One Year Term - Cash Value Only ☐ One Year Term

7. LIFE INSURANCE IN FORCE ON PROPOSED INSURED

Name of Company	Issue Year	Amount	ADB
WILLIAM PENN	1986	None	
United Benefit	1986	165,000	

8. BENEFICIARY for benefits payable upon the death of the proposed insured

	Full Name	Age	Relationship
Primary:	FLORA ANN RULITCH, TRUSTEE, UNDER IRREVOCABLE INSURANCE TRUST AGREEMENT OF WALLACE R. RULITCH DATED 6-2-93		
~~Contingent~~:			

9. NAME OF OWNER if other than proposed insured — Relationship
FLORA ANN RULITCH, TRUSTEE, UNDER IRREVOCABLE INSURANCE TRUST AGREEMENT OF WALLACE R.
Address RULITCH DATED 6-2-93

10. AMOUNT PAID WITH THIS APPLICATION: $ _____
Please read receipt ☐ NONE

11. ☐ ALTERNATE POLICY ☐ ADDITIONAL POLICY
Plan _____ Amt. $ _____ ☐ Par ☐ Non Par
☐ Additional Benefits: ☐ W.P. ☐ ADB ☐ OTHER:

REMARKS:

Complete only if medical examination is to be taken.

Have you consulted a physician within the last five years? If answer is "Yes," give dates, names and addresses and reason for consultations. Yes ☒ No ☐
Annual physical last checkup 3-93 by Dr Llewellyn Sale Jr.

IN CONNECTION WITH THIS APPLICATION FOR INSURANCE, IT IS UNDERSTOOD AND AGREED THAT:

The statements contained here and in Part II of this application and any supplements thereto, copies of which shall be attached to and made a part of any policy to be issued, are true to the best of my knowledge and belief and are made to induce the Company to issue an insurance policy. No agent or other person has power to make, modify, or discharge any contract of insurance.

Except as may be provided in a duly issued Conditional Receipt bearing the same number as this application, no insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability represented in Parts I and II of this application.

A-MO— 0520

DECLARATION

I have carefully read the receipt and understand and agree to the terms thereof including the conditions under which a limited ... become effective prior to policy delivery. I have received the MIB Disclosure and Fair Credit Reporting Act notices.

PLAINTIFF'S EXHIBIT 35

City St Louis State of Missouri Signature of Proposed Insured W. R. Rulitch

Date 5-1 19 93 Signature of Spouse (Spouse Rider only) _____

Witness Linda Hoenstine Signature of Owner (if a corporation) Flora Ann Rulitch, Trust

002074

WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA

MEDICAL
PART II OF APPLICATION TO WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA

EXAMINATION TO BE MADE IN PRIVATE. PLEASE READ ALL QUESTIONS TO APPLICANT.
ANSWERS TO BE RECORDED BY THE MEDICAL EXAMINER IN HIS OWN HANDWRITING.

1. PROPOSED INSURED: Wallace Ruwitch — A. Height: 5'10" — B. Weight: 144 — C. Change in weight in past 12 months (Give reason) lbs. Loss _____ Gain _____ Same

D. Name of Personal Physician: L. Sale, M.D. — Physician's Address: 4544 Forest Park St Louis Mo — Date and reason last consulted - if none, so state: 1yr. ago — Physic

Questions 2-8 are answered to the best of my knowledge and belief.	YES	NO	Give full details if any answer to Questions 2-8 is Yes Dates, Doctors' Names & Addresses.
2. Have you any physical defects?	☐	☑	
3. Have you ever:			
a. received treatment or joined an organization for alcoholism or drug addiction; or used habit-forming drugs other than as prescribed by a licensed physician?	☐	☑	
b. applied for or received disability benefits from any source?	☐	☑	
4. Have you ever had:			
a. convulsions, paralysis, neuritis, nervous breakdown, dizziness, fainting spells, migraine headaches, nervous or mental disorder?	☐	☑	
b. high blood pressure, chest pain, shortness of breath, palpitation, heart attack, disorder of heart or blood vessels?	☐	☑	
c. hemorrhage, chronic hoarseness or cough, asthma, tuberculosis, spitting of blood, emphysema, disorder of respiratory system?	☐	☑	
d. chronic indigestion, ulcer, hernia, colitis, intestinal bleeding, disorder of stomach, gall bladder, liver, digestive or abdominal organs?	☐	☑	
e. kidney stone, diabetes, sugar, albumen, pus, or blood in urine, disorder of kidneys, bladder, genito-urinary organs?	☐	☑	
f. rheumatic fever, arthritis, gout, disorder of muscles, bones, joints or spine?	☐	☑	
g. impairment of vision or hearing or disease of eyes, ears, nose or throat?	☐	☑	
h. tumor, cancer, venereal disease, disorder of blood, skin, thyroid or other glands?	☐	☑	
i. treatment or observation in any hospital or institution? (past 5 years)	☐	☑	
j. X-rays, electrocardiograms, blood studies or other diagnostic tests? (past 5 years) When, why, by whom, with what results?	☑	☐	3j) X-Ray Blood, EKG. Dallas Med 1958 Dr. L. Sale
k. treatment or consultations with any physicians or practitioners, other than as stated above (past 5 years)? Give details.	☑	☐	2k) Prostatic check — Dr. Lupon Jamestown
5. Have you in the past 5 years been advised to have or do you contemplate a surgical operation?	☐	☑	
6. Are you now pregnant? (If so, how many months)	☐	☑	
7. Have you smoked cigarettes in the past 12 months?	☐	☑	

8. Provide family history — Mother ☑ Alive at age ☐ Deceased at age Reason?
Father ☑ Alive at age ☐ Deceased at age Reason?

The statements and answers are true to the best of my knowledge and belief and are made for the purpose of inducing the company to issue insurance on my life.

Signed at St. Louis (City) Mo (State) — Proposed Insured: Wallace Ruwitch

Date 3/10/62 — Witness: Eugene Beauchamp M.D. (Examiner) AMA

MP-1000/62

Definitions

INSURED is the person whose life the contract insures, and is named in the Schedule.

WE, US, OUR refer to William Penn Life Assurance Company of America (the Company).

YOU, YOUR refer to the Owner named in the Schedule, and may be someone (or an organization) other than the person whose life is insured.

DEATH BENEFIT means the Face Amount shown in the Schedule, if the Insured dies while the policy is in full force; the amount may be changed by other provisions of the contract.

BENEFICIARY is the person or entity named to receive the Death Benefit.

POLICY DATE is shown in the Schedule, and is the date on which the contract goes into effect. Contract years and anniversaries will be determined from the Policy Date.

AGE is shown in the Schedule, and is the Insured's Age as of the nearest birthday, on the Policy Date.

ATTAINED AGE refers to the Insured's Age on the Policy Date, plus the number of years and whole months which have passed since the Policy Date.

DATE OF ISSUE is the date the policy is issued by the Company.

PAYEE refers to any person or entity to whom payments are made under the contract's Payment Options.

General Information

Entire Contract

This is a contract between you and us. Read your entire contract carefully. The contract, any attached riders and endorsements, and the written application make up the entire contract. A copy of the application is attached to the contract when issued. No statement will be used by us to void the contract or to defend against a claim presented under the contract, unless that statement is contained in the attached copy of the application. Statements in the application will be considered representations and not warranties.

The legal consideration for this contract is the application and the payment of premiums as provided in the contract.

Modification

This contract cannot be changed except through a written agreement signed by one of our officers.

Non-Participation

This contract does not provide for the payment of dividends, and does not share in the gains or losses of the Company.

Adjustment for Incorrect Age or Sex

If the Insured's age or sex is misstated, we will adjust all benefits. The benefits will equal those the premiums paid would have provided at the true age and sex. The rates in effect when the contract was issued will be used in making the adjustment.

Suicide

If the Insured dies by suicide within 2 years from the Date of Issue of this contract, the only death benefit will be the sum of premiums paid. The amount will be paid in a single sum. (If this contract is delivered to a Citizen of Missouri, the suicide limitation applies only if we can prove that the Insured intended suicide at the time of application.)

Time Limit on Contests (Incontestability)

We cannot contest this contract after it has been in force, during the Insured's lifetime, for 2 years from the Date of Issue, except for failure to pay premiums. This rule does not apply to any attached riders providing benefits for total and permanent disability and additional Accidental Death Benefits.

(In South Carolina, our right to contest any benefits is limited to 2 years from the Date of Issue.)

(In Wisconsin, Waiver of Premium and Accidental Death Benefits are contestable after 2 years, but only for fraud.)

APPENDIX A

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 90-1709C(6)
(Consolidated With No. 90-1312C(A)

FLORA ANN RUWITCH, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Plaintiff,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Defendant.

MEMORANDUM

[Filed: March 29, 1991]

Plaintiff Ann Ruwitch brings this action seeking to recover on a two million dollar, convertible term life insurance policy issued by defendant William Penn Life Assurance Company of America. In her petition plaintiff alleges that she has performed all conditions precedent for recovery under the policy, but defendant, by refusing to pay to plaintiff the two million dollars owed under the policy, has breached its insurance obligation to pay the policy proceeds. Plaintiff further alleges that defendant's refusal to pay the proceeds under the terms of the policy is unreasonable, willful and without just cause or excuse and defendant's refusal to pay constitutes a vexatious refusal to pay under § 375.420, Mo. Rev. Stat. (1986).

Plaintiff has moved for summary judgment on the grounds that the pleadings, defendant's discovery, responses, documents produced and depositions taken in this case show that there is no

genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law. Defendant opposes this motion by asserting that there are genuine issues of material fact concerning the issues of the material omission of fact from the May 1, 1989 application for insurance and the "continuing good health" provision of the policy.

Defendant has moved for summary judgment on the grounds that the pleadings, depositions and documents produced in this case demonstrate that there are no genuine issues of fact in dispute as to the falsity of Mr. Ruwitch's statement in the May 1, 1989 application, as to his knowledge of its falsity and as to reliance upon it by defendant and as to the good health clause. Plaintiff opposes this motion.

Upon review of the pleadings, the discovery responses, documents produced and depositions taken in this case, the Court concludes on the record currently before the Court there remain material factual issues which are genuinely disputed concerning the May 1, 1989 reissuance application and the representations made by Mr. Ruwitch in that policy application. Accordingly, plaintiff's motion for summary judgment and defendant's motion for summary judgment will be denied.

Dated this 29th day of March, 1991.

/s/ George Gunn
UNITED STATES
DISTRICT JUDGE